UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant vs. Irvin Industries, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100068.

Appearances: PAUL B. MOSLEY, Esq. and JACK TAYLOR, Esq. of Los Angeles, California for the Complainant

CASEY HAWS, Esq. of Latham and Watkins, Costa Mesa, California for the Respondent

DECISION AND ORDER

EARLDEAN V.S. ROBBINS, Administrative Law Judge

Statement of the Case

This case was tried before me on March 21, 1989 pursuant to a Complaint Regarding Unlawful Employment, filed under 8 U.S.C. Section 1324a against Irvin Industries, Inc., herein called Respondent, by the United States of America, through the Department of Justice, Immigration and Naturalization Service, herein called the Complainant. Attached thereto and incorporated therein is a Notice of Intent to Fine, herein called the NIF, which had previously been served upon Respondent on June 13, 1988. The principal issue herein is whether Respondent, in violation of Section 274A(a)(2) of the Immigration and Nationality Act, continued to employ certain individuals knowing they were unauthorized to work in the United States; and, if so, whether the fine sought by Complainant is excessive and unwarranted under the circumstances herein.

Upon the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the parties I make the following:

FINDINGS OF FACT

The Immigration Reform and Control Act of 1986 (IRCA) establishes several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amends the Immigration and Nationality Act of 1952, herein called the Act, by adding a new Section 274A (8 U.S.C. 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, herein referred to as employer sanctions, upon employers who knowingly hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States. Specifically, Section 274A(a)(2) provides that ``it is unlawful for a person or other entity, after hiring an alien for employment . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment''.

The Complaint alleges, as set forth in the Notice, that Respondent violated Section 274A(a)(2) of the Act by continuing to employ Barbara Jimenez (Count I), Marivel Medina De Melgoza, aka Marivel Melgoza (Count II), Celso Leanos-Saldana (Count III) and Nicandro Calderon-Baez (Count IV) after learning on May 19, 1988 that they were unauthorized to work in the United States.

Respondent, a New York corporation, with a facility located in Santa Ana, California, is engaged in the manufacture of recovery system parachutes for the United States Department of Defense and Department of Energy. With few exceptions, the facts are undisputed. Following a timely Notice of Inspection, on April 18, 1988, Immigration and Naturalization Service (INS) Special Agent Steve Ronald Martin made an on-site inspection of Forms I-9 and other appropriate records at Respondent's Santa Ana facility. It is undisputed that the inspection was carried out with the assistance and cooperation of Respondent's Personnel Manager, Ernestina Angela Sullen.

Although the inspection revealed only minimal paperwork violations as to the Forms I-9, a review of the attached photocopies of supporting documentation,[1] revealed some duplication of alien registration numbers[2] and other suspicious aspects of certain cards. With Sullen's permission, Martin took approximately 128 suspicious Forms I-9 to his office where he checked the alien registration numbers through the INS Central Index System (CIS). Also, on April 28, Martin obtained from Respondent, pursuant to subpoena, certain forms required by the State of California which contain

[1] Mostly Forms I-151 (``green cards'').

[2] Authentic numbers are never duplicated.

Social Security numbers and hire dates of employees.[3]As a result of this check Martin determined that 91 of Respondent's employees, including the four named in the Complaint herein, had presented counterfeit and/or fraudulent ``green cards''.[4]

On May 19, Martin personally served Sullen with a letter reporting the results of the April 18 inspection, herein called the letter, the body of which reads inter alia:

> On April 18th, an inspection was conducted at your place of business by Special Agents of this Service. A review of your Employment Eligibility Verification Forms (Forms I-9) revealed that the following individuals had completed I-9 Forms claiming that they were aliens lawfully admitted to the United States for permanent residence, and presented alien registration cards as proof of employment eligibility (Forms I-151 or I-551):
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> * * * * * * *
>
> This letter is to inform you that, according to the records of the United States Immigration and Naturalization Service, the alien registration cards submitted to you were found to pertain to other individuals, or there was no record of the alien registration number being issued. Unless these individuals can provide valid employment authorization from the United States Immigration and Naturalization Service, they are to be considered unauthorized aliens, and are therefore not authorized to be employed in the United States. Their continued employment could result in fine proceedings ranging from $250.00 to $10,000.00 per unauthorized alien for violation of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986.
>
> If you have any questions, please do not hesitate to call the Employer Sanctions Unit at (213) 894-3838.

At the same time Martin orally informed Sullen that the documentation submitted by the listed employees was insufficient to establish authorization for their employment in the United States. According to Martin, he also stated that each of the listed employees should be required to provide valid additional documentation and that continued employment of persons who failed to provide such documentation could result in a Notice of Intent to Fine which initiates the formal sanction proceedings. Sullen asked if the listed persons should be terminated, Martin said INS did not have the authority to require Respondent to hire or terminate anyone, but their continued employment without valid documentation would be in violation of the law.

At some point during the conversation, Paul Cleveland, Respondent's Vice President and General Manager, came in. Martin and Cleveland went to Cleveland's office and were joined by Sullen

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[3]Report of wage Form DE-3B:

[4]Certain of the ``green cards'' listed valid registration numbers issued to persons other than the employees who presented the cards. Others listed invalid numbers.

shortly thereafter. According to Martin, he directed Cleveland's attention to the letter and said it was self-explanatory. He further said that the continued employment of the 91 individuals listed in the letter could result in a fine unless these employees presented additional work authorization which Respondent should require them to do as soon as possible. Cleveland said he was aware, from newspaper articles, of the fining procedure and that June 1 was the beginning of the fine period. They discussed the possibility of a survey operation.[5]Cleveland said Respondent would cooperate, and requested specific information regarding the survey so he could be ready for it. Martin did not give Cleveland a specific time. Rather, he said only that it would be in the near future, and that surveys are conducted on a sporadic basis because it is very difficult to assemble the number of special agents needed to conduct such an operation. Cleveland asked if he should terminate the listed employees. Martin said yes, if they did not provide additional documentation; but terminations based solely on the information in the letter might result in a lawsuit against Respondent.

According to Martin, he stressed that the additional documentation should be obtained as soon as possible and that continued employment without such documentation could result in a fine. There was some discussion regarding maintaining secrecy as to the impending survey. According to Martin, he told Cleveland that notifying employees as to an impending survey could jeopardize Respondent's work since due to the ignorance of laypersons, employees with valid work authorization might leave Respondent's employ.

Cleveland's version of this conversation differs in some respects from that of Martin. According to him, he had two conversations with Martin. During the first conversation, which was in mid-to-late April, Martin said it appeared there were some false green cards. Cleveland asked what should be done. Martin said it was too early to tell, that he would have to verify the validity of the cards through the computer. Cleveland said if it was determined that some of the employees were illegal aliens, something more than terminations would be needed since terminated employees could immediately go to work a mile away for one of Respondent's competitors. Therefore, Cleveland said, he would prefer that INS conduct a raid. Martin's only response was that INS preferred the term ``survey'' instead of raid, and that it was too early in the investigation to make such a decision. During either this or later con-

[5]A survey involves the entry of INS agents on an employer's premises to interview the employees as to their immigration status in the United States.

versations, Cleveland expressed concern that Respondent might be fined.

Cleveland also testified that on May 19, he read the letter while Martin was in his Office. According to him, Martin explained that this was a form letter but since Respondent was cooperating there would be no fine. Martin further said, according to Cleveland, that they only fined employers who refused to cooperate. There was some discussion regarding the large number of illegal aliens revealed by the investigation and the absence of any Asian names in the letter. Cleveland admits he was the first to mention that a survey was needed to correct the problem. According to his initial testimony, he further said ``Now, if we're going to have a survey and I terminate all of these people who are currently active, there would be no one here for you to pick up then.'' Martin said, ``yes, that's true. We'll have a raid in just a few weeks.'' Martin further said ``we'll pick them up and make a clean sweep of it with our survey'' and that Respondent should not take any immediate action to terminate any of the persons listed on the Notice. Martin also said it would take some time to organize a survey since additional agents would have to be obtained from other locations in the city or area. When asked again to state exactly what was said with regard to pre-survey terminations, Cleveland testified he said, ``we have agreed that we're going to have a raid in a few weeks, whenever you can get it arranged. If I terminate all these people, there is absolutely no reason to have a raid''. Martin replied, ``that's right''. Cleveland said, ``so then I should not terminate these people''. Martin said, ``that's right''. Cleveland also testified that during one of their conversations, Martin said it was not INS policy to fine cooperative first offenders.

Martin denies instructing Cleveland not to terminate the employees listed in the letter. Although Sullen testified she was present for most of the May 19 conversation, she did not testify in detail as to what was said. However, according to her, when Cleveland asked what he should do about the Notice, Martin basically said that Cleveland should read and interpret the letter. She also testified that Martin never said there would be no fine if Respondent cooperated. Rather, he said there might not be a fine. She further testified that Cleveland told her a ``raid'' was imminent, but did not tell her not to terminate any of the listed employees so as to ensure that they would be apprehended during the ``raid.''

Shortly thereafter, Sullen placed a poster near the time clock which read:

ATTENTION

As of May 20, 1988, all employees are to carry identification documents at all times, until company I.D. badges are made.

Employees will not receive their pay checks if they can't produce their Green Card.

Any questions see Personnel.

Thank You.

The purpose of the sign was to ensure that employees with valid work authorization would not be apprehended during the survey.

Plant Manager David Aguilar testified that Cleveland showed him the names in the letter and told him not to terminate any of the listed employees, as he had been instructed by INS to wait and allow INS to ``round those people up''.

Sullen testified that on Friday, November 20, she and Aguilar spoke to the employees listed in the letter. She spoke only to the employees with amnesty receipts. Aguilar spoke to the others, through an interpreter. According to Sullen, Aguilar told these employees, ``go get new identification'', saying that if they returned on Monday with new identification, they would be reemployed. When Sullen asked Aguilar what he was doing, Aguilar said, ``I got that under control''.

Sullen further testified that on Monday, Tuesday and Wednesday of the following week, many of these employees returned with identification under different names. Since she was aware of the discrimination provisions of the Act, did not speak Spanish and the documentation appeared reasonably genuine on its face, she reemployed those persons with new identification even though they were the same persons with different names. She never reported this to Aguilar or Cleveland, since Aguilar had told the employees to obtain new identification and she assumed the new names were part of the new identification. Aguilar denied that he ever requested any employee to present additional work authorization. According to him, Cleveland told him they were not to do anything, so he did nothing.

On June 2, Martin and about 17 other INS agents conducted a survey operation at Respondent's facility. It is undisputed that 38 of Respondent's employees, including the four named in the Complaint herein, were apprehended during the survey. Each of the four admitted in sworn statements that he/she was in the United States illegally and failed to present any documents showing that he/she was authorized to work in the United States.

On June 3, Martin personally served Respondent with a subpoena seeking hire dates of, and information as to the presentation of

additional documentation by, certain employees, including the four named in the Complaint. At this time, Martin spoke with Cleveland and Supervisor Keith Allen Kingsbury. According to Martin, in response to Cleveland's inquiry, he explained the procedure INS would follow with regard to the persons apprehended during the survey. They discussed the possibility that someone within the company was selling counterfeit documents or had knowledge of such and speculated as to that person's identity, including the possibility that Aguilar was that person.

Cleveland asked if he should terminate anyone found to be selling counterfeit documents or to knowingly permit such activity. Martin testified that he specifically told Cleveland not to terminate anyone found selling counterfeit documents or with knowledge of, or complicity in, such sales since that was a matter for INS as a law enforcement agency. Martin said, however, that Respondent could assist INS in formulating a way to combat the problem. There was some discussion regarding the placement of an undercover agent on Respondent's payroll. Cleveland said Respondent would cooperate and asked what would happen as a result of the survey. Martin said a decision would be made with his supervisor and the trial attorneys as to whether Respondent would be fined or just given a warning citation. Thereafter, on June 13, Martin served a Notice of Intent to Fine on Respondent.

Cleveland admits that most of Martin's account of the June 3 conversation is accurate, but denies that Martin made any statement regarding a possible fine. Cleveland further testified that, after the survey, several of the arrested employees attempted to return to work but Respondent would not rehire them. Kingsbury did not testify with regard to this conversation. He did testify, however, that after the survey he went through the names of the employees listed on the NIF and, when it became clear that a substantial portion of the workforce was involved and that some of the named persons were still in Respondent's employ, he decided to recheck all of the required paperwork. He found some suspicious documents, spoke to the employees involved and instructed them to provide additional documentation within three days.

CONCLUSIONS

The facts establishing the essential elements of a violation of Section 274A(a)(2) of the Act are undisputed. Jimenez, De Melgoza, Leanos-Saldana, and Calderon-Baez entered Respondent's employ after the effective date of the Act. On May 19, Complainant served upon Respondent a letter reporting the results of the inspection, dated May 18, which stated that 91 of Respondent's employees, in-

cluding Jimenez, De Melgoza, Leanos-Saldana and Calderon-Baez, had presented invalid documents as proof of employment eligibility. The letter specifically stated that unless those individuals could provide valid employment authorization, their continued employment could result in fine proceedings for violation of the Act. Yet Respondent failed to reverify their employment authorization and continued to employ them, without such verification, until June 2 when they were apprehended by Complainant during a survey of Respondent's facility.

Therefore, Complainant argues, it is clear that Respondent has violated the Act and that the requested fines are warranted. However, Respondent contends that it did not possess the requisite wrongful intent since it continued to employ these persons in compliance with the specific instructions of INS Special Agent Martin. As set forth above, this is the principal factual dispute herein. Cleveland testified that Martin instructed him not to discharge the suspected unauthorized aliens. Martin denies that he did so. Rather, according to him, he specifically told Cleveland that continued employment of these employees could result in a fine unless the employees presented additional work authorization, which Respondent should require them to do as soon as possible.

In support of Cleveland's credibility Respondent argues that (1) Martin's notes on the conversation make no specific mention that he told Cleveland their continued employment could result in a fine; (2) in all other respects Respondent has cooperated with INS so it is unlikely that Respondent would not terminate these employees unless Cleveland was told not to do so; (3) the size of the potential fine and the potential of losing government contracts, which comprise 100% of Respondent's business, gave Respondent a strong motive to comply with any reasonable INS requests, and (4) Respondent's good faith is corroborated by its immediate post-survey conduct of reverifying its entire work force and terminating nine employees who were not apprehended during the survey, but admitted they were not authorized to work in the United States.

I find this argument unpersuasive. The post-survey reverifications and terminations were the independent decision of Keith Kingsbury who had no involvement, insofar as the record reveals, in Respondent's pre-survey conduct. Also, I do not find it particularly revealing that Martin's notes contain no reference to a statement which was a mere reiteration of statements in the letter that he served upon Respondent, and waited for Cleveland to read, during the course of the conversation. Further, I note that Cleveland initiated discussion of a possible survey because of his expressed concern as to the possibility that merely terminating unau-

thorized aliens who had been trained by Respondent would result in them seeking employment as trained workers with Respondent's competitor, a result that Cleveland wished to avoid. Thus, it is apparent that Cleveland had motivations for failing to terminate these employees which were unrelated to any request by an INS agent.

I credit Martin in this regard. I found him to be an honest, reliable witness who was endeavoring to tell the truth. Further, Sullen's testimony tends to corroborate his version. Although she was not questioned in detail, she did testify that when Cleveland asked what he should do about the Notice, Martin said he should read and interpret the Notice. She further testified, contrary to Cleveland, that Martin never said Respondent would not be fined if he cooperated. Rather, according to her, he said Respondent might not be fined. She also testified, without contradiction, that Cleveland never told her they were not to terminate any of the listed employees so as to ensure that they would be apprehended during the survey. Further, she testified that, following the May 19 conversation with Martin, the listed employees were told to submit new documentation. Finally, from Sullen's testimony as to the careful way in which Martin refrained from specifically telling her what she should do, which comports with my observation of his manner of testifying, I find it unlikely that Martin would tell Cleveland outright something completely contrary to the letter. Accordingly, I find that Martin did not tell Cleveland not to terminate the unauthorized aliens.

However, even assuming arguendo that he did make such a statement, Respondent's defenses still must fail. In support of its alleged lack of wrongful intent, Respondent relies upon the first case decided under the Act, United States of America v. Mester Manufacturing Company, OCAHO Case No. 87100001 (June 17, 1988), Aff'd. 879 F.2d 561 (9th Cir. 1989), which Respondent interprets as concluding that the government cannot establish the requisite ``wrongful intent'' if ``the agent misinformed respondent as to what was expected of an employer.'' However, I find nothing in that decision to support Respondent's interpretation. Rather, the Judge there concluded, inter alia, that once an employer is put on notice, from whatever source, of an employee's possible unauthorized status, the employer has an affirmative duty to make timely and specific inquiry as to the employee's employment eligibility and to discharge the employee, absent proof of such eligibility.

Respondent raises two other defenses. First, entrapment; and second, the argument that by his alleged statement, Martin authorized Respondent to continue to employ certain aliens and thus they

are not ``unauthorized aliens'' for purposes of the Act. As to the former, entrapment is a criminal defense not available to Respondent herein.

As to the latter, the plain language of the Statute and the wording of the letter reporting the results of the inspection clearly put Respondent on notice that by such instruction, Martin was exceeding his authority. ``It is well established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority''. Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1100 (9th Cir. 1981), See also Cheers v. Secretary of Health, Education, and Welfare, 610 F.2d 463, 469 (7th Cir. 1979); Mukherjee v. INS, 793 F.2d 1006 (9th Cir. 1986); Wagner v. Director, Federal Emergency Mgmt. Agency, 847 F.2d 515 (9th Cir. 1988); U.S. v. Killough, 848 F.2d 1523 (11th Cir. 1988).

I therefore conclude that, as alleged in the Complaint, Respondent continued to employ Jimenez, De Melgoza, Leanos-Saldana and Calderon-Baez after learning that they had presented invalid documents as proof of employment eligibility and without reverifying their employment authorization. I further conclude that Respondent has failed to establish a viable defense. Accordingly, I find that Respondent has violated Section 274A(a)(2) of the Act, 8 U.S.C. Section 1324a(a)(2), as alleged.

CONCLUSIONS OF LAW

1. Respondent, a California corporation, is a legal entity within the meaning of 8 U.S.C. Sec. 1324a (a) and 8 C.F.R. Sec. 274a.1(b).

2. Barbara Jimenez, Marivel Medina De Melgoza, aka Marivel Melgoza, Celso Leanos-Saldana, and Nicandro Calderon-Baez, each is an alien unauthorized for employment in the United States.

3. Barbara Jimenez, Marivel Medina De Melgoza, aka Marivel Melgoza, Celso Leanos-Saldana, and Nicandro Calderon-Baez, each was hired by, and continued to work for, Respondent after November 6, 1986.

4. Respondent has violated Section 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(2), by continuing to employ in the United States Barbara Jimenez (Count I of the Complaint), Marivel Medina De Melgoza, aka marivel Melgoza (Count II of the Complaint), Celso Leanos-Saldana (Count III of the Complaint) and Nicandro Calderon-Baez (Count IV of the Complaint), knowing each of them to be, or to have become, an unauthorized alien with respect to such employment.

CIVIL PENALTIES

Since I have found violations of Section 274A(a)(2) of the Act, assessment of civil money penalties and a cease and desist order are required by the Act. Section 274(e)(4) provides:

> (4) CEASE AND DESIST ORDER WITH CIVIL MONEY PENALTY FOR HIRING, RECRUITING, AND REFERRAL VIOLATIONS.--With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection--
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> (A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--
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> (i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred. (ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this subparagraph, or (iii) no less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this subparagraph; and
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> (B) may require the person or entity--(i) to comply with the requirements of subsection (b) (or subsection (d) if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and (ii) to take such other remedial action as is appropriate.
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> * * * * * * *

The Complaint seeks a penalty of $2000 for the violations found with regard to each of the four employees named above in the conclusions of Law, the maximum amount permitted under the Act for a first violation. Although the Act provides for the consideration of certain factors in determining the amount of any money penalties imposed for violations of Section 274A(a)(1)(B), it provides no such guidelines for the assessment of monetary penalties for Section 274A(a)(1)(A) and (a)(2) violations other than history of prior violations which is reflected in the statute by a lower monetary range for first time violators and a higher range for previous multiple violations. Since the amount requested by Complainant is within the statutory limit, Respondent is an employer with annual sales of $12-14 million and no mitigating circumstances have been asserted with regard to the size of the fine. I find the total fine in the amount of $8,000 to be appropriate. I further find that in the circumstances herein of a first violation, the absence of significant paperwork violations or other showing of blatant disregard for the requirements of the Act, and in view of Respondent's prompt post-survey reverification and consequent terminations, an Order of Compliance under Section 274A(e)(4)(B) is not warranted.

ORDER

IT IS HEREBY ORDERED that;

1. Respondent pay a civil money penalty for each of the four violations with regard to continuing to employ in the United States Barbara Jimenez (Count I), Marivel Medina De Melgoza, aka Marivel Melgoza (Count II), Celso Leanos-Saldana (Count III), and Nicandro Calderon-Baez (Count IV) knowing each of them to be, or to have become, an unauthorized alien with respect to such employment.

2. Respondent shall cease and desist from violation of the prohibitions against hiring, recruiting, referring or continuing to employ unauthorized aliens, in violation of Section 274A(1)(A) and (a)(2) of the Act 8 U.S.C 1324a(a)(1)(A) and (a)(2).

3. That, pursuant to 8 U.S.C. 1324a(e)(6) and Section 68.51 of practice and procedure of this office, 28 C.F.R. 68.51, this decision and order shall become the final Order of the Attorney General unless within thirty (30) days from the date of this decision and order the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: March 9, 1990.

EARLDEAN V.S. ROBBINS
Administrative Law Judge